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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re M.L.-W., a Minor.	
ROBERT L. et al., Plaintiffs and Respondents, v. SEAN W. et al., Objectors and Appellants.	G042397 (Super. Ct. No. AD77004) O P I N I O N

Appeals from orders of the Superior Court of Orange County, Michael J. Naughton, Judge. Affirmed.

Marsha F. Levine, under appointment by the Court of Appeal, for Objector and Appellant S.W.

Robert McLaughlin, under appointment by the Court of Appeal, for Objector and Appellant J.S.

Sharon L. Grier for Plaintiffs and Respondents.

Leslie A. Barry, under appointment by the Court of Appeal, for the Minor.

Jacqueline S. and Sean W. appeal from orders terminating their parental rights to their daughter, M. The court concluded that termination was appropriate as to both Jacqueline and Sean, based upon a finding of "abandonment" pursuant to Family Code[1] section 7822. The court also concluded that termination of Jacqueline's parental rights was appropriate based upon a determination that the facts underlying her felony conviction were of such a nature as to prove her unfitness to have future custody and control of M. (§ 7825.)

Jacqueline argues the court erred in terminating her parental rights because both its determination she intended to abandon M., and its determination her felony record demonstrated her unfitness as a parent, were unsupported by substantial evidence. Sean does not contest the court's abandonment finding against him but argues only that if this court determines the trial court erred in terminating Jacqueline's parental rights to M., it should reverse the order terminating his parental rights as well.

We find no error in the court's decision and affirm its orders. Although not undisputed, the evidence is sufficient to support the trial court's determination Jacqueline provided no significant financial support, and had only token contact with M., during the years prior to the guardians' filing of their petition to terminate parental rights. Indulging all inferences in support of the trial court's decision, as we are required to do, we conclude the evidence is sufficient to sustain its decision to terminate Jacqueline's parental rights on the basis of abandonment.

Moreover, Jacqueline has waived any challenge to the sufficiency of the evidence to support the trial court's determination the facts of her felony conviction demonstrate unfitness to parent M. in the future. The court's assessment of the felony conviction, which it characterized as a "home invasion robbery" carried out for the benefit of a "white supremacist skinhead street gang," was apparently based upon

[1] All further statutory references are to the Family Code unless otherwise indicated.

certified documents relating to that conviction, and those documents have not been included in our record on appeal. Without the complete record of the evidence considered by the trial court, we cannot entertain a challenge to the sufficiency of that evidence to support its findings.

The orders are affirmed.

FACTS

M. was born in July of 2004. During the first 9-12 months of her life, Jacqueline acted as her parent, providing for her support and doing the usual things parents do for their children. However, after that initial period, Jacqueline's father and stepmother began assuming a more primary role in M.'s life, and in October of 2005, Jacqueline agreed to having them appointed as M.'s legal guardians.[2] In connection with the establishment of guardianship, Jacqueline was allowed only monitored visitation with M. Since that time, M. has continued to reside with her guardians/grandparents, while Jacqueline has acted more as a "visitor" in her life.

In November of 2005, Jacqueline was arrested on felony charges and was taken into custody. While she was in custody, Jacqueline's father (one of M.'s guardians) would bring M. to visit her in jail monthly. Also, Jacqueline's mother, Sharon, would bring M. to visit her on weekends when Sharon had custody of M. Jacqueline also claimed she had telephone contact with M. approximately three times a week during that period, and sent her letters, including cards and drawings, "at least three times a week." However, M.'s stepgrandmother/guardian denied any recollection of Jacqueline calling that often.

[2] Respondents have requested that we take judicial notice of the transcript of the hearing on the guardianship petition, along with the order establishing the guardianship, to demonstrate that Jacqueline agreed with the guardianship. However, that evidence was not before the trial court, and the fact to be established – Jacqueline's agreement – is already supported by the testimony of M.'s stepgrandmother. Because the record already contains substantial evidence of Jacqueline's agreement, we have no need to consider additional evidence on the point. The request for judicial notice of the transcript of the guardianship proceeding is consequently denied.

In October of 2006, while the charges were still pending, Jacqueline was released on bail, and went to live with Sharon. Jacqueline had monitored visits with M., at Sharon's house, on a regular basis during that time. Jacqueline began working at a mortgage company, and she stated that although she tried to give M.'s guardians a check to help with the cost of M.'s support, they would not accept it. She claimed she bought gifts and clothing for M. during this period, and provided her with food during visitation. The guardians disputed the extent of gift giving claimed by Jacqueline.

In April of 2007, approximately six months after she had been bailed out of jail, Jacqueline was again arrested, for possession of a controlled substance, and returned to jail. Jacqueline has not been out of custody since that time.

After her April 2007 arrest, Jacqueline's father (M.'s guardian) would bring M. to visit her in jail on occasion, generally once a month. Sharon also brought M. to visit Jacqueline, until February of 2008, when the guardians told Sharon to stop doing so. These visits lasted 40 minutes, on average, and were non-contact, with the inmate and the visitors separated by glass and speaking through a telephone receiver. Jacqueline claimed that during this period, she also spoke with M. by regular telephone, on the weekends when Sharon had custody of her. Jacqueline also claimed she continued to send cards and drawings, as gifts to M., approximately three times a week.

In April of 2008, Jacqueline's father brought M. to visit her in jail for the last time. He informed Jacqueline that he and his wife wished to adopt M., and asked Jacqueline to consent. She refused.

In May of 2008, Jacqueline was sentenced to 12 years in prison, and transferred to the California Institute for Women (CIW) in Chino. She testified she was not allowed to have telephone calls for approximately two months, and when her telephone access was restored, she was unable to reach M. by telephone for an additional period of a month or two, because M.'s guardians "didn't accept my calls." The stepgrandmother/guardian agreed that at some point between February and April of 2008,

they had decided to cut off telephone contact between Jacqueline and M., on the advice of M.'s therapist, because it had become too distressing to M. According to the stepgrandmother, Jacqueline would ask M. "when are you going to come see me?" and M. would become agitated and tell Jacqueline "I don't want to talk anymore." The grandfather/guardian stated that he never refused to take any of Jacqueline's calls after she was transferred to prison, although sometimes Jacqueline called when they were not at home and the call went to the answering machine. He estimated Jacqueline called less than once a month during this period: "Sometimes there were two months where she didn't call, and then sometimes she'd [call] at the beginning of one month and at the end of that month. So I'd say on an average about two out of every three months."

Jacqueline also attempted to arrange for M. to visit her in prison on a couple of occasions, as part of the "Childspace" program which sets up special days designed for children's visits, in which the prison provides games and activities much like a carnival, so that the inmates and their children can enjoy spending the day together. However, the guardians felt that such an event would impart the wrong message that prison is a "fun" place, and declined to allow M. to participate on the advice of her therapist.

The court took judicial notice of documents demonstrating Jacqueline had a felony conviction for violation of Health and Safety Code section 11378, dating from January of 2001 (case No. 01WF0815); a May 2008 felony conviction, for violation of Health and Safety Code section 11350 (case No. 07WF0977); and a May 2008 felony conviction, for violation of Penal Code section 211 – which the court characterized as "a home invasion robbery in concert with three or more people" – with a gang enhancement (Pen. Code, § 186.22, subd. (b)) and an enhancement for committing the crime while out on bail for another crime (Pen. Code, § 12022.1). Jacqueline was sentenced to prison for 12 years as a result of the May 2008 convictions.

The court ruled that Jacqueline had left M. "with no provision for her support or without communication for a period in excess of six months." The court found that Jacqueline had done so "voluntarily," because she had voluntarily engaged in the criminal conduct which caused her to be incarcerated. The court concluded that Jacqueline's conduct met the statutory test for establishing a presumption of abandonment "at least from April of 2007 forward." The court found that any support offered by Jacqueline for M. was "at best, token," and that her contact with M. "is considered token."

The court then acknowledged that the presumption a parent intended to abandon a child was rebuttable, but stated Jacqueline had offered insufficient evidence to rebut it. The court explained that Jacqueline's stated desire to retain her parental relationship with M. was not "the true test" of her intentions. Instead, her intentions were evidenced by her actions: "people judge us by our actions, how we act and what we do. She rarely has been around the better part of the child's life, but rather left the responsibility for [M.] to others."

The court also ruled that Jacqueline's conduct fell within the purview of section 7825, in that her "past criminal history . . . consider[ed] with the conviction of a home invasion robbery for the benefit of a gang while out on bail leads the court to find that this violent felony conviction proves by clear and convincing evidence the unfitness of the respondent." More specifically, the court explained that Jacqueline's felony drug history, which dated back to 2001, had "escalated" to participation in a "violent home invasion robbery. She also admitted to a gang enhancement to the robbery . . . and that participation was in furtherance of the benefit of a street gang, which was PEN1, which is short for Public Enemy Number 1, which I think anybody who has been around here knows it's a white supremacist skinhead street gang." The court stated that "while that offense in and of itself probably wouldn't be sufficient to terminate, the criminal history along with the patterns of a violent felony along with being at least an associate or

supporter of a skinhead street gang gives me the feeling that it isn't going to get any better. [¶] Given the escalating nature of her conduct, I find that the chance of rehabilitation is quite limited."

With respect to Sean, the court ruled that he never had custody of M. since her birth, that he had provided "virtually nothing" to her support, and that his contact with her had been "at best, sporadic and token." The court concluded Sean had failed to provide any credible evidence to rebut the presumption of abandonment set forth in section 7822, and therefore declared that Sean had legally abandoned M.

Finally, the court concluded that terminating the parental rights of both Jacqueline and Sean would be in M.'s best interests and ordered that they be terminated.

I

Section 7822 provides for a court proceeding to declare a child "abandoned" by a parent, and thus free to be adopted by someone else. The statute applies in specified circumstances, including when "[t]he child has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child." (§ 7822, subd. (a)(2).) The statute also specifies that "[t]he . . . *failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents.* In the event that a guardian has been appointed for the child, the court may still declare the child abandoned if the parent or parents have failed to communicate with or support the child within the meaning of this section." (§ 7822, subd. (b), italics added.)

As this court has previously explained in *Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010-1011, "[a]n appellate court applies a substantial evidence standard of review to a trial court's findings under section 7822. ([*In re*] *Amy A.* [(2005)]

132 Cal.App.4th [63,] 67.) Although a trial court must make such findings based on clear and convincing evidence (§ 7821), this standard of proof '"is for the guidance of the trial court only; on review, our function is limited to a determination whether substantial evidence exists to support the conclusions reached by the trial court in utilizing the appropriate standard."' (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1211.) Under the substantial evidence standard of review, '"[a]ll conflicts in the evidence must be resolved in favor of the respondents and all legitimate and reasonable inferences must be indulged in to uphold the judgment."' (*In re Brittany H.* (1988) 198 Cal.App.3d 533, 549.) Abandonment and intent '"are questions of fact for the trial judge . . . . His decision, when supported by substantial evidence, is binding upon the reviewing court. An appellate court is not empowered to disturb a decree adjudging that a minor is an abandoned child if the evidence is legally sufficient to support the finding of fact as to the abandonment [citations]."' (*Ibid*.)"

This standard of review places a very heavy burden on the appellant, especially as the trial court has discretion not only to believe others, but to *disbelieve* appellant. (*Adoption of Allison C., supra*, 164 Cal.App.4th at p. 1013 ["As to fathers testimony he tried to send Allison cards and letters '[a]ll through her life,' the court was entitled to disbelieve or discount that testimony"].)

In this case, we have no choice but to conclude the evidence was sufficient to support the trial court's finding that Jacqueline intended to "abandon" M. as that term is used in section 7822. We start with the proposition that "[i]ntent to abandon, as in other areas, may be found on the basis of an objective measurement of conduct, as opposed to stated desire." (*In re Rose G.* (1976) 57 Cal.App.3d 406, 424.) Jacqueline "left" M. in the custody of a third party when she was only 16 months old, by agreeing to the establishment of a guardianship in favor of her own father and his wife. Within a month after that, Jacqueline had been arrested on felony charges, and with the exception of one six-month period, has been in custody ever since.

Although Jacqueline made efforts to remain in contact with M. during her incarceration with cards and letters, phone calls and non-contact visits at the jail, the court did not err in deeming those efforts "token." This is not the level of meaningful contact one would normally expect between a parent and child. And while one might infer that Jacqueline's limited contact with M. was merely the unavoidable consequence of her incarceration – and thus not fairly construed as token effort under the circumstances (see *In re T.M.R.* (1974) 41 Cal.App.3d 694, 699 ["during the entire period when she was separated from her children due to her incarceration, defendant utilized the only means of communication available to her by writing to them twice a month"]) – we cannot draw that inference. The evidence demonstrates Jacqueline agreed to place M. under the legal guardianship of Jacqueline's father and stepmother, and thus to assume the role of a visitor in M.'s life, *before* she was initially incarcerated. Consequently, the evidence suggests Jacqueline's limited role in M.'s life was not forced upon her by incarceration, but was instead her voluntary choice. In accordance with our obligation to interpret the record in the light most favorable to the orders challenged on appeal, we must presume that inference is the correct one. Consequently, the court did not err in characterizing Jacqueline's contacts with M. to be "token."

The court's determination Jacqueline provided only token support for M. was likewise supported by substantial evidence. By her own admission, Jacqueline had never paid any money to M.'s guardians for the cost of her support. Jacqueline did claim she once offered the guardians a check (in an unspecified amount), during the six-month period she was out of custody, but that offer was refused. However, even assuming the court believed her, which it was not required to do, a single attempt to offer financial support for M. can properly be characterized as a token effort. Moreover, the fact Jacqueline may have also bought M. some clothes and gifts, and provided her with food during visits at Sharon's home – also during her six-month hiatus from custody – does not alter the analysis. Nor does the estimated $10 per week Jacqueline claimed she spent

on drawings, cards and gifts sent to M. while incarcerated. All of these efforts, taken together, are but a token when compared to the actual cost of raising a little girl.

In concluding there was substantial evidence to support the trial court's conclusion that Jacqueline intended to "abandon" M. as that term is defined in section 7822, we do not mean to suggest the evidence would compel anyone to conclude Jacqueline did not love M., or that she was indifferent to maintaining some sort of relationship with her. Section 7822 concerns itself with only one type of relationship – the parental one, with all its attendant responsibilities. We conclude merely that the court did not err in concluding the evidence demonstrated Jacqueline intended to relinquish that parental role.

II

Jacqueline also contends the court's determination her parental rights should be terminated pursuant to section 7825, because the facts underlying her felony conviction demonstrate her future unfitness to be a parent, was likewise unsupported by substantial evidence.

As explained in *In re Christina P.* (1985) 175 Cal.App.3d 115, in order to support a termination of parental rights under section 7825, "the evidence must show a felony which proves the unfitness of the felon-parent. Unfitness means a probability that the parent will fail in a substantial degree to discharge parental duties toward the child. (See *O'Brien v. O'Brien* (1968) 259 Cal.App.2d 418, 422-423; *Guardianship of Willis* (1954) 123 Cal.App.2d 446, 450-451.)" (*Id.* at p. 133.)

The specific issue to be determined is whether "the conditions, i.e., the criminal disposition of the parent which gave rise to the felony convictions would continue in the future to render the parent unfit to care for the child." (*In re Terry E.* (1986) 180 Cal.App.3d 932, 952.) That determination is committed to the sound discretion of the trial court, and "where a trial court has discretionary power to decide an issue, a reviewing court will not disturb that decision unless the trial court has exceeded

the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination." (*Adoption of D.S.C.* (1979) 93 Cal.App.3d 14, 24-25.)

However, an attack on the sufficiency of the evidence cannot be considered on appeal unless we are provided with the entire evidentiary record relied upon by the trial court in making its challenged decision. "We review claims of insufficient evidence by examining the *entire record* in the light most favorable to the judgment below." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196, italics added.) In this case, as Jacqueline acknowledges in her opening brief, the trial court "took judicial notice of [her] felony convictions" based upon certified documents presented during the trial. However, those documents are not included in our record on appeal, and thus we have no basis for concluding they do not provide sufficient information about the facts underlying her felony convictions. To the contrary, we are required to presume they do. Under these circumstances, we must conclude Jacqueline's attack on the sufficiency of the evidence to show the facts underlying her felony conviction is waived.

In any event, accepting as true the court's characterization of Jacqueline's felony offenses, we could not say the court abused its discretion in concluding they established her unfitness to parent M. in the future. Not only did Jacqueline have a history of felony drug offenses, but the felony robbery of which she was convicted was no garden-variety stick-up. Instead, Jacqueline participated in a violent home-invasion robbery, with several cohorts, for the benefit of a notorious white supremacist skinhead street gang. Just her association with such a gang raises significant concerns, although we would not go so far as to say that fact alone necessarily determines unfitness to parent. But in this case, Jacqueline did not merely associate with this gang, she carried out a depraved crime for its benefit. We cannot say the court abused its discretion in concluding Jacqueline's felony convictions demonstrated she was unlikely to be rehabilitated, and was thus unfit to parent M. in the future.

The orders terminating both Jacqueline's and Sean's parental rights to M. are affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

ARONSON, J.